Supreme Court, U. S.
FILED
APR 21 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

APRIL TERM, 1978

No. 77-1507

CHEYENNE RIVER SIOUX TRIBE OF INDIANS,
Petitioner,

v.

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RICHARD SCHIFTER
Suite 1000
600 New Hampshire Ave., N.W.
Washington, D.C. 20037
Counsel for Petitioner

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

TABLE OF CONTENTS

Page

OPINIONS BELOW .....

JURISDICTION 2

QUESTIONS PRESENTED 2

PROVISIONS OF THE CONSTITUTION OF THE UNITED STATES INVOLVED 3

STATUTORY PROVISIONS INVOLVED 3

FEDERAL REGULATION INVOLVED 5

STATEMENT OF THE CASE 5

REASONS FOR GRANTING WRIT 6

1. The Decision Below Conflicts With the Decisions of this Court 6
2. The Decision Below Raises Significant and Recurring Problems Concerning the Administration of Indian Tribal Self-Government 9

CONCLUSION 13

APPENDIX A - Denial of Petition for Rehearing en-banc 1a

APPENDIX B - Opinion and Judgment of Court of Appeals 1b

APPENDIX C - Opinion and Judgment of District Court for the District of South Dakota 1c

APPENDIX D - Letter from Department of Interior confirming number of Secretarial Referendum Elections 1d

TABLE OF AUTHORITIES

Cases:

Cheyenne River Sioux Tribe v. Kleppe, 424 F. Supp. 448 (D.S.D. 1977) 2

Cheyenne River Sioux Tribe v. Andrus, 566 F.2d 1085 (8th Cir. 1977) 1

Crowe v. Eastern Bank of Cherokee Indians, Inc., 506 F.2d 1231 (4th Cir. 1974) 11

Groundhog v. Keeler, 442 F.2d 674 (10th Cir. 1971) 11

Helvering v. Wiese, 292 U.S. 614 (1934) 9

Howlett v. Salish and Kootenai Tribes, 529 F.2d 233 (9th Cir. 1976) 10

McCurdy v. Steele, 506 F.2d 653 (10th Cir. 1974) 11

Native American Church of North America v. Navajo Tribal Council, 272 F.2d 131 (10th Cir. 1959) 11

Talton v. Mayes, 163 U.S. 376 (1896) 7

United States v. Wheeler, 46 U.S.L.W. 4243 (U.S., March 22, 1978) 7,8-9, 10,13

Wounded Head v. Tribal Council of the Oglala Sioux Tribe, 507 F.2d 1079 (8th Cir. 1975) 8

Constitution of the United States:

Amendment V 7,10

Amendment XV 12

Amendment XXVI 2,5,8,10,12

Statutes:

25 U.S.C. §476 2,3,5,9

25 U.S.C. §479 4,5,8

25 U.S.C. §1301 et seq. 10

25 U.S.C. §1302 9,11

28 U.S.C. §1254(1) 2

Regulations:

25 C.F.R. §52.1(e) 5,6

Miscellaneous:

113 Cong. Rec. 35474 (1967) 11

114 Cong. Rec. 5836 (1968) 12

IN THE

Supreme Court of the United States

APRIL TERM, 1978

No.

CHEYENNE RIVER SIOUX TRIBE OF INDIANS,

Petitioner,

v.

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioner Cheyenne River Sioux Tribe of Indians prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on December 16, 1977.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 566 F.2d 1085, and appears in Appendix B hereto. The opinion of the District Court for the District of South Dakota is

reported as *Cheyenne River Sioux Tribe v. Kleppe*, 424 F. Supp. 448 (D.S.D. 1977), and appears in Appendix C hereto.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on December 16, 1977. A timely petition for rehearing *en banc* was denied on January 24, 1978, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether an Indian tribe which, in exercising its inherent right to create a system of self-government, utilizes the framework offered by the Indian Reorganization Act, 25 U.S.C. §476, thereby subjects itself to the limitations which the Constitution of the United States imposes on the Government of the United States.

2. Whether a referendum election to amend an Indian tribal constitution is, if held under the provisions of the Indian Reorganization Act, a "federal election" and thus governed by the requirements of the Twenty-Sixth Amendment to the Constitution.

3. Whether the minimum voting age of twenty-one in Indian tribal constitutional referendum elections, as set forth in the Indian Reorganization Act, was reduced to eighteen by operation of the Twenty-Sixth Amendment.

PROVISIONS OF THE CONSTITUTION OF THE UNITED STATES INVOLVED

Amendment XXVI

Section 1. The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

STATUTORY PROVISIONS INVOLVED

25 U.S.C. §476. Organization of Indian tribes; constitution and bylaws; special election

Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. Such constitution and bylaws, when ratified as aforesaid and approved by the Secretary of the Interior, shall be revocable by an election open to the same voters and conducted in the same manner as hereinabove provided. Amendments to the constitution and bylaws may be ratified and approved by the Secretary in the same manner as the original constitution and bylaws.

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local Governments. The Secretary of the Interior shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Bureau of the Budget and the Congress. June 18, 1934, c. 576, §16, 48 Stat. 987.

25 U.S.C. §479. Definitions

The term "Indian" as used in sections 461, 462, 463, 464, 465, 466-470, 471-473, 474, 475, 476-478, and 479 of this title shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. For the purposes of said sections, Eskimos and other aboriginal peoples of Alaska shall be considered Indians. The term "tribe" wherever used in said sections shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation. The words "adult Indians" wherever used in said sections shall be construed to refer to Indians who have attained the age of twenty-one years. June 18, 1934, c. 576, §19, 48 Stat. 988.

FEDERAL REGULATION INVOLVED

25 C.F.R. §52.1(e) "Adult Indian" means any Indian who has attained the age of 18 years.

STATEMENT OF THE CASE

More than forty years ago, on October 29, 1935, the eligible voters of the Cheyenne River Sioux Tribe of South Dakota, by referendum, chose to avail themselves of the opportunity offered by the Indian Reorganization Act, 25 U.S.C. §476, to restructure their form of self-government and adopt a Tribal Constitution. The Secretary of the Interior approved the new Tribal Constitution on December 23, 1935. At that time the Indian Reorganization Act provided that only "adult Indians" might vote for the adoption of a Tribal Constitution or amendments thereto. The term "adult Indians" was defined as "Indians who have attained the age of twenty-one years". 25 U.S.C. §479. These provisions of the Act have not been altered to this day.[1]

Following adoption of the Twenty-Sixth Amendment to the Constitution of the United States in 1971, the Secretary of the Interior promulgated regulations governing referendum elections under the Indian Reorganization Act. These regulations were based on the assumption that the Twenty-Sixth Amendment had had the effect of lowering

[1]The Cheyenne River Sioux Tribe also adopted the age of twenty-one as the minimum voting age under its Tribal Constitution. Constitution of Cheyenne River Sioux Tribe, Article V, Section 1.

the voting age under the Indian Reorganization Act to eighteen, even though the Act had not been expressly amended. 25 C.F.R. §52.1(e).

In April 1976, the Council of the Cheyenne River Sioux Tribe called upon the Secretary of the Interior to make arrangements for a referendum election on a proposed amendment to the Tribal Constitution. The Secretary scheduled such election for November 30, 1976. Pursuant to the Secretary's regulations governing referendum elections persons eighteen years of age would have been permitted to vote.

Challenging the legal validity of the regulations of the Secretary of the Interior, which purported to supersede the statutory age requirement contained in the Indian Reorganization Act, the Cheyenne River Sioux Tribe brought this suit, asking for declaratory and injunctive relief. Specifically, the Tribe sought a determination that the Indian Reorganization Act was not affected by the Twenty-Sixth Amendment and that the Secretary's regulations insofar as they are based on the contrary premise are invalid.

The Tribe's motion for summary judgment was granted by the District Court. The Court of Appeals reversed and remanded with instructions to grant defendants' motion for summary judgment, holding that Indian tribal constitutional referendum elections are "federal elections".

REASONS FOR GRANTING WRIT

1. The Decision Below Conflicts With the Decisions of this Court.

Overruling the decision of the District Court, the Court of

Appeals held in this case that a referendum election to amend an Indian tribal constitution pursuant to the provisions of the Indian Reorganization Act is a "Federal election". That holding is in sharp conflict with the decisions of this Court in *Talton v. Mayes*, 163 U.S. 376 (1896), and, very recently, in *United States v. Wheeler*, 46 U.S.L.W. 4243 (U.S., March 22, 1978).

In *Talton v. Mayes, supra*, this Court clearly and unmistakably laid down the principle of law that Indian tribes are not subject to the restrictions which the Constitution of the United States imposes on the Federal Government and that Indian tribes are not to be regarded as having Federal status. In that case the Court dealt with the contention of a Cherokee Indian, convicted of murder by a court of the Cherokee Nation, that his indictment by a grand jury of five had violated the Fifth Amendment of the United States Constitution. The Court held that the Fifth Amendment did not govern:

> "True it is that in many adjudications of this court the fact has been fully recognized that although possessed of these attributes of local self-government when exercising their tribal functions, all such rights are subject to the supreme legislative authority of the United States. . . . But the existence of the right in Congress to regulate the manner in which the local powers of the Cherokee Nation shall be exercised does not render such local powers Federal powers arising from and created by the Constitution of the United States. It follows that as the powers of local self-government enjoyed by the Cherokee Nation existed prior to the Constitution, they are not operated upon by the 5th Amendment, . . . " 163 U.S. at 384. (Citation omitted.)

While *Talton* laid down the basic underlying legal

principle that Indian tribal action is not Federal action for purposes of applying the standards of the United States Constitution, it was in *United States v. Wheeler, supra*, that this Court made it clear that the principle must apply *even where there is Federal involvement in the process by which Indian tribes discharge their inherent powers.* In *Wheeler* the Court held that a person charged with the same criminal act in both the Tribal and Federal courts was not placed in double jeopardy even though the Tribal conviction occurred under a "Tribal Code . . . approved by the Secretary of the Interior before becoming effective." 46 U.S.L.W. at 4247.

The conflict between the decision below and the opinions expressed by this Court in *Wheeler* can be illustrated most clearly by comparing the passages in the two opinions which deal with the essence of this dispute. In the instant case, the Court of Appeals relied on its earlier dictum in *Wounded Head v. Tribal Council of the Oglala Sioux Tribe*, 507 F.2d 1079, 1084 (8th Cir. 1975) that "Secretarial elections are specific federal elections regulated by federal statute to which the provisions of the twenty-sixth amendment apply." Referring to the Indian Reorganization Act, the court continued:

> "[I]t is the source of the Secretary's regulatory authority over these elections [which characterize these elections as federal], such authority having congressional and not tribal, origin. The Congress, not the Tribe, delegates to the Secretary the authority to call and conduct Secretarial elections, and the Congressional definition of 'adult Indians' in 25 U.S.C. §479 leaves no doubt that it intended a uniform *federal* age qualification for voters in Secretarial elections." (Emphasis in original.)

In *Wheeler*, this Court reached the very opposite conclusion on precisely the same point of law:

> "[T]he Indian Reorganization Act of 1934, §16, 48 Stat. 987, 25 U.S.C. §476 . . . authorized the Tribe to adopt a constitution for self-government. And the Indian Civil Rights Act of 1968, 82 Stat. 77, 25 U.S.C. §1302, made most of the provisions of the Bill of Rights applicable to Indian tribes. . . .
>
> "But none of these laws *created* the Indians' power to govern themselves and their right to punish crimes committed by tribal offenders. (Emphasis in original.) Indeed the Wheeler-Howard Act [Indian Reorganization Act] . . . recognized that Indian tribes already had such power under 'existing law'. See Powers of Indian Tribes, 55 I.D. 14 (1934). *That Congress has in certain ways regulated the manner and extent of the tribal power of self-government does not mean that Congress is the source of that power.*" (Emphasis supplied.) 46 U.S.L.W. at 4247.

The conflict between the decision of the Court of Appeals and the opinion of this Court, as stated since that decision was rendered, is so self-evident as to justify the granting of this petition and simultaneous reversal of the judgment below on the authority of *United States v. Wheeler.* See *Helvering v. Wiese*, 292 U.S. 614 (1934).

2. The Decision Below Raises Significant and Recurring Problems Concerning the Administration of Indian Tribal Self-Government.

If allowed to stand, the decision of the Court of Appeals could wreak havoc with the orderly process of Indian tribal self-government by giving those who wish to attack the

outcome of tribal elections new legal grounds for doing so. Nor would the problem remain small and isolated. ~~Ref~~ Referendum elections under the Indian Reorganization Act take place frequently and on many different reservations. During the last three years, the number of Secretarial referendum elections held under the Indian Reorganization Act has been the following:

- 1975 14
- 1976 9
- 1977 15.[2]

The decision of the Court of Appeals in this case to the contrary notwithstanding, the chances that another Circuit might sustain a challenge to the Secretary's voting age regulations are great, in light of the dictum in *Wheeler*. Thus, there would be continuing uncertainty as to the proper rules under which Indian constitutional referendum elections are to be held, continuing litigation, and the likelihood of a conflict of circuits. The inevitable recurrance of the dispute would be avoided if this Court were to resolve the question now.

The mischief which the decision below is likely to create reaches beyond the issues posed by the 18-year-old vote and the Twenty-Sixth Amendment. The rationale followed by the Court of Appeals would make the Fifth Amendment equally applicable to Indian tribal elections, creating a host of new problems which would require judicial resolution.

The prevailing law to date has been that while the Indian Civil Rights Act of 1968, 25 U.S.C. §1301 et seq., governs Indian tribal affairs, the Bill of Rights and subsequent amendments do not. *Howlett v. Salish and Kootenai*

[2]See Appendix D.

Tribes, 529 F.2d 233 (9th Cir. 1976); *Crowe v. Eastern Band of Cherokee Indians, Inc.*, 506 F.2d 1231 (4th Cir. 1974); *McCurdy v. Steele*, 506 F.2d 653 (10th Cir. 1974); *Groundhog v. Keeler*, 442 F.2d 674 (10th Cir. 1971); *Native American Church of North America v. Navajo Tribal Council*, 272 F.2d 131 (10th Cir. 1959). As a matter of fact, it was to fill the void created by the non-applicability to Indian tribal affairs of certain fundamental guarantees contained in the Federal Constitution, that Congress passed the Indian Civil Rights Act. These rights are specifically enumerated in the Act. Pub. L. 90-284, Sec. 202, 82 Stat. 77, 25 U.S.C. §1302.[3] The law is now settled that in deciding civil rights issues involving Indian tribes as defendants, courts look to the Indian Civil Rights Act for guidance, not the Constitution of the United States. The decision below would reopen this question, which was thought to have been resolved, and introduce an important element of legal uncertainty into Indian tribal affairs.

[3]When the Indian Civil Rights bill, which was ultimately incorporated into Pub. L. 90-284, first reached the floor of the Senate, its sponsor, Senator Ervin, explained its purpose:

> "The first title established the certain rights, giving the Indian citizen the basic rights and privileges in his relationship with his tribal government that every other American citizen now has in his relationship with his State, local and Federal Governments. . . .
>
> "The tribal governments have been considered by the courts as quasi-sovereign entities to whose actions the Bill of Rights along with other constitutional provisions, do not apply."
>
> 113 Cong. REc. 35474 (1967).

A few months later, when, as a result of inaction in the House of Representatives, Senator Ervin moved to have the Indian Civil Rights bill made part of what became the Civil Rights Act of 1968, he summarized his views as follows:

(continued)

Finally, the Circuit Court's reasoning compels consideration of the applicability of the Fifteenth Amendment to referendum elections held under the Indian Reorganization Act. The text of this amendment is virtually identical to that of the Twenty-Sixth Amendment and it would follow logically from the decision below that the Fifteenth Amendment as well must apply to Indian tribal referendum elections. Yet, that conclusion undermines the central premise of the Indian Reorganization Act, which does not interfere with the power of tribes to limit membership on the basis of ancestry. If the Fifteenth Amendment issue were raised in an Indian referendum election to challenge discrimination on the ground of race, some rationale would surely be found to distinguish between the Fifteenth and the Twenty-Sixth Amendments, in spite of the similarity in language between the two amendments. Yet, the fact that this case could lead to such a fundamental challenge to Indian tribal existence, which would then have to be avoided by overruling this case or finding some ingenious way of distinguishing it, points up the need for this Court to deal now with the problem posed by the decision below by reversing that decision summarily.

(footnote continued from preceding page)

> "The reservation Indian now has no constitutional rights. The purpose of the amendment is to give these Indians constitutional rights which other Americans enjoy."
>
> 114 Cong. Rec. 5836 (1968).

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Eighth Circuit. Beyond that, consideration should be given to summary reversal on the authority of *United States v. Wheeler*, 46 U.S.L.W. 4243 (U.S. March 22, 1978).

Respectfully submitted,

RICHARD SCHIFTER
Suite 1000
600 New Hampshire Ave., N.W.
Washington, D.C. 20037

Counsel for Petitioner

April 1978

CERTIFICATE OF SERVICE

I hereby certify that on this day of April, 1978, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to Counsel for the Respondents indicated below:

Hon. David V. Vrooman
United States Attorney
231 Federal Building and Courthouse
400 South Phillips
Sioux Falls, South Dakota 57102

Drew S. Days, III, Esquire
Margo McKay, Esquire
Office of Indian Rights
Civil Rights Division
Department of Justice
Washington, D.C. 20530.

I further certify that all parties required to be served have been served.

Richard Schifter
Suite 1000
600 New Hampshire Ave., N.W.
Washington, D.C. 20037
Counsel for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

77-1208 September Term, 1977

Cheyenne River Sioux Tribe, Appellee, vs. Cecil D. Andrus, etc., et al., Appellants.	)	Appeal from the United States District Court for the District of South Dakota

The Court having considered petition for rehearing en banc filed by counsel for appellee and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

January 24, 1978

APPENDIX B

[1085]

CHEYENNE RIVER SIOUX TRIBE,
Plaintiff-Appellee,

v.

Cecil D. ANDRUS, Secretary of the United States Department of the Interior, et al., Defendants-Appellants.

No. 77-1208.

United States Court of Appeals,
Eighth Circuit.

Submitted Oct. 11, 1977.

Decided Dec. 16, 1977.

[1086] Margo M. McKay, Atty., Dept. of Justice, Office of Indian Rights, Washington, D. C. (argued), William F. Clayton (former U. S. Atty.), David V. Vrooman, U. S. Atty., Sioux Falls, S. D., and Drew S. Days, III, Asst. Atty. Gen., and James W. Clute, Atty., U. S. Dept. of Justice, Washington, D. C., on brief, for defendants-appellants.

Dennis H. Hill, Costello, Porter, Hill, Nelson, Heisterkamp & Bushnell, Rapid City, S. D., for plaintiff-appellee; James R. McCurdy, Eagle-Butte, S. D., and T. Michael Carter, Rapid City, S. D., on brief.

Before GIBSON, Chief Judge, BRIGHT, Circuit Judge, and TALBOT SMITH,* Senior District Judge.

TALBOT SMITH, Senior District Judge.

In the action before us the Tribe, as plaintiff, seeks declaratory and injunctive relief against the defendants, who are all officials of the Department of the Interior, Bureau of Indian Affairs.[1] The case arises from a conflict between the Tribal and federal constitutions as to the age limitation on the right to vote in an election to amend the Tribal constitution. The plaintiff insists upon the primacy of the Tribal constitution; the defendants, per contra, argue that the federal constitution controls.

The district court,[2] entertaining motions for summary judgment by both plaintiff and defendants, found that there was no genuine issue as to any material fact, and concluded that plaintiff was entitled to summary judgment as a matter of law. We reverse and remand with instructions to grant the defendants' motion for summary judgment.

[1,2] The Cheyenne River Sioux Tribe is an unincorporated tribe of Indians which has accepted the provisions of the Indian Reorganization Act, 25 U.S.C. § 461, *et seq.*, (hereafter the Act). To implement the purpose of the

*TALBOT SMITH, Senior District Judge, Eastern District of Michigan, sitting by designation.

[1]The plaintiff alleges that district court jurisdiction is conferred by 28 U.S.C. §§1331, 1337, 1343, 1361, and 1362. A declaratory judgment and injunctive relief are sought under 28 U.S.C. §§2201 and 2202.

[2]The Honorable Andrew W. Bogue, United States District Judge for the District of South Dakota. The district court's opinion is reported as *Cheyenne River Sioux Tribe v. Kleppe*, 424 F.Supp. 448 (D.S.D.1977).

Act to "encourage Indians to revitalize their self-government,"[3] the Act confers upon an accepting tribe various powers of self-government, including the powers to employ legal counsel, to prevent the sale of tribal property without tribal consent, and to negotiate with the federal, state and local governments.[4]

[3,4] The powers granted and authorized under the Act
[1087] are not without limitation. Despite the Act's encouragement of tribal self-government, it is beyond question that Congress possesses plenary powers of control over the unique situation of the tribes. As succinctly stated in our opinion in *Wounded Head v. Tribal Council of Oglala Sioux Tribe*, 507 F.2d 1079, 1084 (8th Cir. 1975), it is "established authority that Congress has exclusive and plenary power to enact legislation with respect to the Indian tribes." The Tenth Circuit has made a similar observation in a reference to *Simmons v. Eagle Seelatsee*, 244 F.Supp. 808 (E.D. Wash.1965), *aff'd per curiam*, 384 U.S. 209, 86 S.Ct. 1459, 16 L.Ed.2d 480 (1966):

> [I]t was well settled that Congress has plenary control over Indian tribal relations and property, and that such power continues after such Indians have become citizens * * *;

[3]*Fisher v. District Court*, 424 U.S. 382, 387, 96 S.Ct. 943, 946, 47 L.Ed.2d 106 (1976). *See also Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 151-152, 93 S.Ct. 1267, 36 L.Ed.2d 114 (1972).

[4]25 U.S.C. § 476. Of at least equal importance, the Act reconfirms in an accepting tribe all of the powers which the tribe possessed by virtue of its quasi-sovereign status under previous law. 55 Interior Dec. 14, 15-30 (1934). *See also* F. Cohen, *Handbook of Federal Indian Law* 122-149 (1942). The powers of quasi-sovereignty inhere in an Indian tribe due to its unique position within the federal system. *See Wounded Head v. Tribal Council of Oglala Sioux Tribe*, 507 F.2d 1079, 1081 (8th Cir. 1975) and cases cited therein.

> [and] * * * it was early held that such plenary power of Congress included the power to regulate and determine tribal membership, and in so doing to define and describe those persons who should be treated and regarded as members of an Indian tribe * * *.

Groundhog v. Keeler, 442 F.2d 674, 680 (10th Cir. 1971) (citations omitted).[5]

The Act authorizes tribal organization and the adoption of a tribal constitution, but places the Secretary of Interior in a regulatory position over these processes. Two sections of the Act relate to elections on ratification and amendment of tribal constitutions, 25 U.S.C. § § 476 and 479. They provide in relevant part, as follows:

> § 476. Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. Such constitution and bylaws, when ratified as aforesaid and approved by the Secretary of the Interior, shall be revocable by an election open to the same voters and

[5]*See also*, Note, *Tribal Self-Government and the Indian Reorganization Act of 1934*, 70 *Mich.L.Rev.* 955 (1972), which observes that the Act has not granted full autonomy to the tribes. The author concludes that, "[e]ven under the final Act, the Secretary was empowered to review many actions of the tribal governments [citing 25 U.S.C. § 476, which we consider, *infra*] and still retains close control over tribal government." *Id.*, at 968.

conducted in the same manner as hereinabove provided. *Amendments to the constitution and bylaws may be ratified and approved by the Secretary in the same manner as the original constitution and bylaws.* (Emphasis added.)

§ 479. The term "Indian" as used in sections * * * 476-478, and 479 of this title shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood * * *. The term "tribe" wherever used in said sections shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation. *The words "adult Indians" wherever used in said sections shall be construed to refer to Indians who have attained the age of twenty-one years.* (Emphasis added.)

Pursuant to his authority under 25 U.S.C. § 476 to call these so-called "Secretarial elections,"[6] the Secretary has promulgated rules and regulations,[7] the purpose of which, in part, was "to provide uniformity and order in holding elections to vote on constitutions and bylaws and *constitutional amendments,* and to facilitate the calling of such elections by the Secretary under the provisions of the Indian
[1088] Reorganization Act."[8] (Emphasis added.) Under these

[6]25 C.F.R. §52.1(b) defines a "Secretarial election" as an election held within a tribe pursuant to regulations prescribed by the Secretary.

[7]25 C.F.R. §52.1 *et seq.*

[8]25 C.F.R. §52.2.

regulations, the Secretary's supervisory role includes authorizing the election,[9] having a representative serve as a member of a three-member election board,[10] deciding election contests,[11] and final approvai of the amendment.[12]

After passage of the twenty-sixth amendment to the United States Constitution,[13] the Secretary took the position that the twenty-sixth amendment superseded the twenty-one year old voter age requirement set by 25 U.S.C. § 479.[14] The Secretary subsequently amended his regulations to permit otherwise qualified eighteen year olds to vote in Secretarial elections.[15]

Under the provisions of the Act, the Tribe had adopted a constitution. In October, 1976, the Tribal Council presented a tribal resolution to the Secretary of the Interior requesting that he call an election to amend the Tribal constitution. The amendment would restrict future membership of the Tribe to "[a]ll children of ¼ or more degree Cheyenne River Sioux Indian blood * * *."

The Secretary called the election as requested, and in November, 1976, issued a notice which stated that the

[9]25 C.F.R. §53.8.

[10]25 C.F.R. §52.8.

[11]25 C.F.R. §52.18.

[12]25 C.F.R. §476.

[13]Section 1 of the twenty-sixth amendment to the United States Constitution provides:

> The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

[14]This view was first expressed in Op. Solic. Interior Dep't #36840, 78 Interior Dec. 349 (1971).

[15]*See,* 25 C.F.R. § §52.1(e), 52.10a(a), and 52.11.

election "shall be conducted in the manner prescribed under Title 25, Code of Federal Regulations, Subchapter G, Part 52," [governing Secretarial elections]. The notice also announced the following voter qualifications:

> If you are over 18 years of age or will be 18 on or before November 30, 1976, you are eligible to register to vote in elections called by the Secretary of the Interior. You are not eligible to vote if a Secretarial Election is held before your 18th birthday, even though you are registered.

The Indian Constitution, on the other hand, provides that

> All enrolled members of the Cheyenne River Tribe, 21 years of age or over, who have maintained legal residence on the reservation for a period of one year immediately prior to any election shall have the right to vote.[16]

The question presented is a narrow one, namely the proper age limitation on the right to vote in an election to amend the Tribal constitution. The district court held that the Secretary's role in the elective process did not amount to a "substantial federal involvement" and was insufficient to characterize the election as a federal election. The district court declared in substance that the Secretary's action regarding the voter age was an unwarranted intrusion upon tribal autonomy.

[5] Contrary to the opinion of the district court, we agree with the statement by this Court in *Wounded Head v. Tribal Council of the Oglala Sioux Tribe, supra,* that "Secretarial elections are specific federal elections regulated by federal statute to which the provisions of the

[16]Article V, Elections and Nominations, Section 1.

twenty-sixth amendment apply." *Id.*, at 1084 (footnote omitted). It is not merely the number or type of federal involvements which characterize these elections as federal; such a test would sweep too broadly, given the variety of the Secretary's administrative and regulatory functions in tribal affairs. Rather, it is the source of the Secretary's regulatory authority over these elections, such authority having congressional and not tribal, origin. The Congress, not the
[1089] Tribe, delegates to the Secretary the authority to call and conduct Secretarial elections, and the Congressional definition of "adult Indians" in 25 U.S.C. § 479 leaves no doubt that it intended a uniform *federal* age qualification for voters in Secretarial elections.

[6] The eligible voting age of "adult members" of the Tribe, originally those "who have attained the age of twenty-one years,"[17] has, since the passage of the twenty-sixth amendment, become eighteen years. The similarity of the language of the twenty-sixth and fifteenth amendments, coupled with the long-held construction of the latter as a self-executing declaration of right,[18] lead us to construe the

[17]25 U.S.C. §479, *supra.*

[18]The Supreme Court reviewed the self-executing nature of the fifteenth amendment in *South Carolina v. Katzenbach*, 383 U.S. 301, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966):

> Section 1 of the Fifteenth Amendment declares that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." This declaration has always been treated as self-executing and has repeatedly been construed, without further legislative specification, to invalidate state voting qualifications or procedures which are discriminatory on their face or in practice. [Citing cases.] These decisions have been rendered with full respect for the general rule, reiterated last Term in *Carrington v. Rash*, 380 U.S. 89, 91, 85 S.Ct. 775, 777, 13 L.Ed.2d 675, that States "have broad powers to determine the

(continued)

twenty-sixth amendment to invalidate voter age qualifications which were set higher than eighteen years. Thus, the Secretary's regulation defining an "adult Indian" as "any Indian who has attained the age of 18 years"[19] is a proper, indeed unavoidable, use of his power and authority under 25 U.S.C. §§476 and 479.

In view of the self-executing nature of the twenty-sixth amendment there can be no reasonable doubt that the Secretary had complete authority, indeed a mandate, to recognize the age of 18 years as the eligible voting age for adult Indians with respect to the adoption of a tribal constitution. But the Tribe would draw a distinction between the adoption of a tribal constitution and its amendment. It argues that "The language of the Indian Reorganization Act is silent as to the qualifications for voters in an election held to *amend* a tribal constitution, and does not abrogate the Cheyenne River Sioux Tribe's right to set such qualifications in its Constitution." (Emphasis added.) The distinction asserted is not persuasive. The provision of the Indian Reorganization Act referring to the amendment of a constitution plainly states that it may be "ratified and approved by the Secretary in the same manner as the original constitution and bylaws."[20] The "same manner," in this context, refers to "a majority vote of the adult members [now 18 years of age] of the tribe * * * at a special election authorized and called by the Secretary of

(footnote continued from preceding page)

conditions under which the right of suffrage will be exercised." The gist of the matter is that the Fifteenth Amendment supersedes contrary exertions of state power.

Id., at 325, 86 S.Ct. at 817 (citations omitted).

[19]25 C.F.R. §52.1(e).

[20]25 U.S.C. §476.

the Interior under such rules and regulations as he may prescribe."[21] We find nothing in the Act, nor in its legislative history, justifying a reading of the statute that would apply one eligible age to the adoption of the constitution and another to the amendment of the same article. Both actions are of equal dignity and importance.

The judgment below is reversed, and the case is remanded with instructions that the defendants' motion for summary judgment be granted.

[21]*Id.*

APPENDIX C

[448] **CHEYENNE RIVER SIOUX TRIBE**

v.

Thomas S. KLEPPE, etc., et al.

No. Civ. 76-3062.

United States District Court,
D. South Dakota.

Jan. 4, 1977.

James R. McCurdy, Eagle Butte, S. D., for plaintiff.

Brian Hagg, Asst. U. S. Atty., Rapid City, S. D., for defendants.

MEMORANDUM OPINION

BOGUE, District Judge.

Plaintiff in this action seeks declaratory and injunctive relief against Defendants, who are all officials of the Department of Interior, Bureau of Indian Affairs.

The Secretary of the Interior has called a special election for the purpose of amending the constitution and bylaws of
[449] the Cheyenne River Sioux Tribe. The proposed amendment would require that a person be of at least one-fourth Cheyenne River Sioux Indian blood to be enrolled as a member of the Tribe. The Tribe's Constitution requires that only enrolled members who have attained the age of twenty-

one may vote in tribal elections. Art. V §1. Despite this requirement in the Tribe's Constitution, the Secretary intends to extend the vote in the special election on the proposed constitutional amendment to eighteen year old Tribal members. In so doing, he is acting pursuant to 25 C.F.R. §§52.1(e); 52.6(a)(1); 52.10a(a); 52.11. *Cf. Wounded Head v. Tribal Council of the Oglala Sioux Tribe*, 507 F.2d 1079 (8th Cir. 1975).

The election in question had been scheduled for November 30, 1976. On November 22, 1976, this Court, after informal notice and hearing, entered an Order temporarily restraining the scheduled election. At the November 22, 1976 hearing, counsel for the Defendants indicated that the factual allegations in the Complaint were not disputed, and that he had no objection to submitting the matter on briefs. Subsequently, the Defendants filed a Motion to Dismiss, which has been denied except insofar as it sought dismissal of the claims against the Defendants in their individual, as opposed to official, capacities. Plaintiff has clarified the procedural posture of the case by filing a Motion for Summary Judgment. This Court has carefully considered the entire file, as well as defense counsel's statement made November 22, 1976 that the factual allegations are not disputed, and has determined that there is no genuine issue as to any material fact. This Court concludes that Plaintiff is entitled to summary judgment as a matter of law.

The Cheyenne River Sioux Tribe is an unincorporated tribe of Indians which has accepted the provisions of the Act of June 18, 1934. 25 U.S.C. §§461 *et seq.* Under that Act and the Tribe's Constitution, the Secretary of the Interior is required, upon request of the Tribal Council supported by petitions signed by Tribal members, to call special elections

for the purpose of submitting proposed amendments to the Tribal Constitution to the Tribal electorate. 25 U.S.C. §476; Constitution of the Cheyenne River Sioux Tribe, Art. IX. Under Part 52 of 25 C.F.R., the Secretary is to both call and supervise these elections. His supervisory duties include: (1) having a representative serve as one member of a three-member election board (the other two members are to be governing officers of the Tribe), 25 C.F.R. §52.8; (2) considering and determining election contests, 25 C.F.R. §52.18; and (3) giving final approval to any amendments, 25 U.S.C. §476.

Following the adoption of the twenty-sixth amendment to the United States Constitution, the Secretary promulgated regulations requiring that eighteen year olds be allowed to vote in elections of this nature. *E. g.* 25 C.F.R. §52.10a. Basically, then, the Secretary's position is that "Secretarial elections," or elections called by him for the purpose of submitting proposed amendments to Tribal constitutions, are "federal" in nature and thus subject to the twenty-sixth amendment. It may be noted at this point that the Secretary draws a distinction between "Tribal" elections (*e. g.* for the election of Tribal officials) and "Secretarial" elections (for the submission of proposed constitutional amendments) for purposes of determining the applicability of the twenty-sixth amendment. *See Wounded Head v. Tribal Council of the Oglala Sioux Tribe,* 507 F.2d 1079, 1080 n. 1 (8th Cir. 1975).

[1] The twenty-sixth amendment to the United States Constitution provides:

> The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

The twenty-sixth amendment does not, by its terms, apply to Tribal governments. Accordingly, eighteen year olds enjoy no constitutional right to vote in what has been called "internal tribal elections." *Wounded Head, supra.*

The only reported case relevant to the issue presented here is *Wounded Head, supra,* wherein the Eighth Circuit Court
[450] of Appeals held that the twenty-sixth amendment is not applicable to tribal elections. While the issue of whether the twenty-sixth amendment is applicable to "Secretarial" elections was not before it for decision, the *Wounded Head* Court considered the question in the following dictum:

> As stated in an opinion of the Solicitor [of the United States Department of the Interior] the provisions restricting the franchise in tribal elections are not applicable to "Secretarial" elections. Secretarial elections are specific federal elections regulated by federal statute to which the provisions of the twenty-sixth amendment apply. 507 F.2d at 1084.

Thus, the Secretary's position in this lawsuit is not without support. However, it must be noted that the particular issue here was not squarely presented in *Wounded Head.* This Court concludes, for reasons that follow, that the supposed distinction between "Tribal" and "Secretarial" elections is without merit.

[2] As noted above, the Cheyenne River Sioux Tribe is organized under the Act of June 18, 1934, popularly known as the Indian Reorganization Act. The specific purpose of the Indian Reorganization Act was to foster and encourage self-government by the various Indian tribes. *Fisher v. District Court of Sixteenth Judicial District of Montana,* 424 U.S. 382, 96 S.Ct. 943, 946, 47 L.Ed.2d 106 (1976). *Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 151, 93

S.Ct. 1267, 1271, 36 L.Ed.2d 114 (1973). It seems clear to this Court that the process of creating and amending a constitution is basic to the concept of self-government. This is particularly true in the instant case, since the proposed constitutional amendment to be submitted at the special election deals with blood quantum requirements for Tribal membership, an area traditionally reserved for Tribal self-government. *See Daly v. United States,* 483 F.2d 700, 706 (8th Cir. 1973).

[3,4] The Secretary urges that a "Secretarial" election is a "federal" election and thus subject to the twenty-sixth amendment because of substantial federal involvement under 52 C.F.R. Part 52. Thus he would have the Court merely add up the indicia of federal involvement to determine whether the twenty-sixth amendment applies. Because of the presence of federal officials on Indian reservations, it would seem that any Tribal election is, to some extent, subject to federal supervision. For example, a federal official is to administer the oath of office to each newly elected tribal official, under Article III, Section 6 of the Constitution of the Cheyenne River Sioux Tribe. It should also be noted that the Secretary of the Interior has the power to review many of the ordinances and resolutions of the Cheyenne River Sioux Tribal Council. Const. Art. IV S.2. Yet it cannot be seriously contended that this federal review power, in and of itself, removes such ordinances and resolutions from the protected domain of internal tribal affairs. In the opinion of this Court, the test urged by the Secretary, and accepted in the *Wounded Head* dictum discussed above, is too mechanistic. Its application pays insufficient attention to what Felix Cohen has described as follows:

> The first element of sovereignty, and the last which may survive successive statutory limitations of Indian tribal power, is the power of the tribe to determine its own form of government. Cohen, Handbook of Federal Indian Law 126.

This power of self-government is meaningless unless the Tribe has the power to make decisions basic to the formation and amendment of its Constitution. Certainly a Tribe should be free to implement its views concerning voting age, since it should be free to choose to continue to respect age over youth in its governmental processes. In the absence of more explicit federal legislation[1] than what is presented here, this Court is
[451] unwilling to force the ideas of white America regarding voting age upon an Indian Tribe which hopefully continues to possess some attributes of sovereignty. The federal government's trust responsibility is not to be broadly used as an administrative tool to overcome the policy of Indian self-determination.

[5] Unfortunately, both the result and the approach used in this case appear to be somewhat novel. It seems to this Court that, at the administrative level, the recurrent clashes between the trust responsibility and the policy of self-determination are resolved in a manner detrimental to tribal self-government. All too often, Courts seem to pay little more than lip service to the right and power of Indian peoples to govern themselves. It must be remembered that this right and power is subject to diminution only by express Con-

[1]Indeed, applicable federal legislation still sets the voting age at twenty-one for "Secretarial" elections. Adoption and amendment of Tribal Constitutions is to be accomplished by a vote of "adult Indians," 25 U.S.C. §476, which are defined as Indians twenty-one or older. 25 U.S.C. §479.

gressional enactment, not administrative rule-making which under the guise of the trust responsibility seeks to erode what vestiges of Indian sovereignty remain.

The result of this case appears novel because it contradicts the *Wounded Head* dictum. This Court is convinced, however, that now that the specific issue regarding the application of the twenty-sixth amendment to Tribal Constitutional elections has been squarely presented, the need for Tribal autonomy requires the result reached here. Indian tribes must be free to be inventive, and increasing federal intervention which is unauthorized by explicit legislation can only quell this inventiveness.

It is no secret that there is great dissatisfaction among the various tribes in the State with the functioning of the Department of Interior through the Bureau of Indian Affairs pertaining to tribal matters. Whether the non-Indian communities would or should act in a similar fashion is simply irrelevant. We cannot—we must not—smother the tribal government in its efforts to retain control of tribal matters.

[6] In summary, since the twenty-sixth amendment does not by its terms apply to tribal elections, since there is no explicit Congressional legislation requiring an eighteen-year old vote, and since the need for tribal autonomy requires that the Secretary's mechanistic test of federal supervision be rejected, Plaintiff's Motion for Summary Judgment will be granted.

The foregoing shall constitute this Court's findings of fact and conclusions of law.

United States Department of the Interior
BUREAU OF INDIAN AFFAIRS
WASHINGTON, D.C. 20245

Tribal Government Services

Mr. Richard Schifter
Fried, Frank, Harris, Shiver
and Kampelman
600 New Hamshire Avenue N.W.
Washington, D.C. 20037

APR 6 1977

Dear Mr. Schifter:

I have enclosed the information you requested on April 3. Listed are the secretarial elections held during 1975, 1976, and 1977 pursuant to the Indian Reorganization Act of 1934 or the Oklahoma Indian Welfare Act of 1936.

Please let me know if you need additional information.

Sincerely,

(Leslie N. Gay, Jr.)
Chief, Branch of Tribal Relations

Enclosure

IRA ELECTIONS - 1975

Tribe	Date
Bay Mills Indian Community	February 20, 1975
Coast Indian Community of the Resighini Rancheria	February 20, 1975
Colorado River Tribes	March 1, 1975
Forest County Potawatomi Community, Wisconsin	April 19, 1975
Cheyenne-Arapaho Tribes	April 19, 1975
Covelo Indian Community of Round Valley	May 8, 1975
Manzanita Band of Mission Indians	July 12, 1975
Sauk-Suiattle Indian Community	July 19, 1975
Manchester Band of Pomo Indians	September 8, 1975
Southern Ute Tribe	September 26, 1975
Sault Ste. Marie Tribe of Chippewa Indians	October 9, 1975
Yerington Paiute Tribe	November 7, 1975
Three Affiliated Tribes of Fort Berthold	November 19, 1975
Utu Utu Gwaitu Paiute	November 22, 1975

IRA ELECTIONS - 1976

Tribe	Date
Rumsey Rancheria	February 1, 1976
Prairie Band of Potawatomi Indians	February 2, 1976
Tuolumne Band of Me-Wuk Indians	February 24, 1976
Bridgeport Indian Colony	April 9, 1976
Caddo	June 26, 1976
Ute Mountain Ute	October 6, 1976
Chemehuevi	October 30, 1976
Menominee	November 12, 1976
Ft. Mohave	November 13, 1976

IRA ELECTIONS - 1977

Tribe	Date
Mescalero Apache	February 16, 1977
Miccosukee	March 9, 1977
Bad River Band of Lake Superior Chippewa Indians	April 9, 1977
Ft. Sill Apache	April 9, 1977
Chemehuevi	April 16, 1977
Elem Indian Colony of Sulfur Bank Rancheria	May 18, 1977
Absentee Shawnee (OIWA)	June 4, 1977
Tonkawa (OIWA)	June 6, 1977
Lower Sioux	June 20, 1977
Muckleshoot	June 18, 1977
Pyramid Lake Paiute	July 1, 1977
Iowa of Oklahoma (OIWA)	August 27, 1977
Rosebud Sioux	October 27, 1977
Kickapoo of Oklahoma (OIWA)	December 10, 1977
Mescalero Apache	December 16, 1977